

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2014-CV-02349

Capital Electric Cooperative, Inc.,

Appellant,

vs.

North Dakota Public Service Commission
and Montana-Dakota Utilities Co., a
Division of MDU Resources Group, Inc.,

Appellees.

**MEMORANDUM AND
ORDER AFFIRMING THE
PUBLIC SERVICE
COMMISSION'S FINDINGS
OF FACT, CONCLUSIONS OF
LAW AND ORDER**

INTRODUCTION

[¶1] This is an appeal by Capital Electric Cooperative, Inc. (Capital Electric) from the *Findings of Fact, Conclusions of Law and Order* of the North Dakota Public Service Commission (PSC) granting Montana-Dakota Utilities Co.'s, a Division of MDU Resources Group (Montana-Dakota) application to extend electric service to Menard, Inc. (Menard) in the NE ¼ of Section 33, Township 139N, Range 77W, Burleigh County, North Dakota (Menard Site).

STANDARD OF REVIEW

[¶2] An appeal from a PSC decision is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. *Coteau Properties Co. v. Oster*, 2000 ND 23, ¶ 5, 606 N.W.2d 876. This court exercises a limited review in appeals from administrative agency decisions. *Bergum v. North Dakota Workforce Safety & Ins.*, 2009 ND 52, ¶ 8, 764 N.W.2d 178. Under § 28-32-46, a district court shall affirm the order of an agency unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. Provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶3] It is not a district court's function to act as a super board when reviewing decisions by an administrative agency and in technical matters involving agency expertise; the Commission's decision is entitled to appreciable deference. *Coteau*, 2000 ND at ¶ 5, 606 N.W.2d 876. This Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency." *Vanlighthout v. N.D. Dep't of Transp.*, 2011 ND 138, ¶ 12, 799 N.W.2d 397. This Court "determine[s] only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record. *Id.*

[¶4] "An agency's decisions on questions of law are fully reviewable." *Kiecher v. North Dakota Dep't of Transp.*, 2005 ND 23, ¶ 8, 691 N.W.2d 266. Restraint is exercised in reviewing an agency's findings of fact. *Bergum*, ¶ 8, 764 N.W.2d at 181. The Commission's decision will not be disturbed on appeal unless it is shown that the determination is not in accordance with the law, or the findings of fact, made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. *Cass County Elec. Coop. v. Otter Tail Power Co.*, 169 N.W.2d 415, 419 (N.D. 1969).

PROCEDURAL HISTORY

[¶5] On November 25, 2013, Montana-Dakota submitted an application to the PSC to extend electric service to the Menard Site. Capital Electric filed a protest on January 16, 2014 and requested a hearing. The PSC issued a notice of hearing on February 26, 2014 identifying the

topics to be considered at the hearing.

[¶6] On May 2, 2014 a public hearing was held at which both parties presented testimony and exhibits. The PSC considered ten issues at the hearing: (1) From whom do the customers prefer electric service? (2) What electric suppliers are operating in the general area? (3) What electric supply lines exist within at least a two-mile radius of the location to be served, and when were they constructed? (4) What customers are served by electric suppliers within at least a two-mile radius of the location to be served? (5) What are the differences, if any, between the electric suppliers available to serve the area with respect to reliability of service? (6) Which of the available electric suppliers will be able to serve the location in question more economically and still earn an adequate return on its investment? (7) Which supplier's extended service would best serve orderly and economic development of electric service in the general area? (8) Would approval of applications result in wasteful duplication of investment or service? (9) Is it probable that the location in question will be included within the corporate limits of a municipality within the foreseeable future? (10) Will service by either of the electric suppliers in the area unreasonably interfere with the service or system of the other? The PSC held three work sessions discussing these issues.

[¶7] On June 13, 2014, Montana-Dakota requested oral argument before the PSC. After the parties submitted briefs, oral argument was held on July 28, 2014. The PSC issued its *Findings of Fact, Conclusions of Law and Order* on September 17, 2014 and issued Montana-Dakota Certificate of Public Convenience and Necessity (CPCN) No. 5845. Capital Electric filed its *Notice of Appeal and Specifications of Error* on October 15, 2014. The parties submitted briefs on appeal and a hearing was held on May 11, 2015.

FACTS

[¶8] Montana-Dakota and Capital Electric are the only electric suppliers operating near the Menard Site. Montana-Dakota is an investor owned electric utility providing electric service to customers in North Dakota under the regulatory jurisdiction of the PSC. Currently, Montana-Dakota serves twenty-eight customers within a mile radius of the Menard site, and twenty-nine customers within two-miles. The PSC found that Montana-Dakota has held a franchise to serve the community of McKenzie, which is immediately northeast and adjacent of the Menard Site, since 1928. The PSC also granted Montana-Dakota a CPCN to construct and operate an electric distribution system in McKenzie in 1928.

[¶9] Capital Electric is a rural electric cooperative providing electric service to its members in North Dakota. Currently, Capital Electric serves four customers within one mile of the Menard Site and eleven customers within two miles. The PSC found that Capital Electric provides electrical service to rural customers adjacent to the Menard Site.

[¶10] McKenzie, North Dakota is an unincorporated Township located northeast and adjacent to the Menard Site. The 1928 franchise granted to Montana-Dakota defined the boundaries of McKenzie as the Southeast $\frac{1}{4}$ of Section 29 and the Southwest $\frac{1}{4}$ of Section 28, Township 139N, Range 77W.

[¶11] In October 2013, Menard began looking for an electric provider to serve its planned manufacturing and distribution center at the Menard Site. The anticipated load at the site is approximately 1.2 MW with an estimated annual consumption of 7 million kWh. As a result, Menard requested estimated rates from Capital Electric and Montana-Dakota. Based on current electrical rates, the total annual estimated cost to Menard from Montana-Dakota was \$513,669.88 while Capital Electric estimated costs of \$575,883.84.

[¶12] Ultimately, Menard decided to request service from Montana-Dakota. This decision was based on cost-savings, future opportunity for cost savings, more reliable service, and rates and services that are subject to regulatory oversight and approval. The PSC determined that Menard preferred electrical service from Montana-Dakota.

[¶13] As a result of Menard's request for service, Montana-Dakota applied for a CPCN. Montana-Dakota owns and operates a 46 kV transmission line that originates in Bismarck and extends east along the north side of Interstate 94 (I-94) providing transmission service for a number of communities, including McKenzie. The transmission line is a two-way, or looped, supply source for Montana-Dakota's substation located north of McKenzie (McKenzie substation). The McKenzie substation supplies the distribution system serving McKenzie and the surrounding area. The transmission lines east and west of the McKenzie substation were rebuilt in 1975 and 1972, respectively.

[¶14] Montana-Dakota's distribution line for McKenzie is a Delta three-phase primary overhead line extending south from the McKenzie substation. The current distribution lines serving McKenzie were constructed in 1960, 1965, 1969, 1971, and 1979. The system extends outside of McKenzie as a single-phase line to serve customers south and west of McKenzie.

[¶15] Central Power Cooperative operates a transmission line located on the south side of I-94 that connects substations at Menoken and Sterling. Capital Electric would serve the Menard Site from the Menoken substation which is located approximately eight miles west of McKenzie. Capital Electric has an underground single-phase distribution line which runs south from I-94 for approximately one-mile to the area of the Menard Site at which point it goes above ground to serve customers in the area. The underground three-phase line along I-94 was built in 1976; the underground single-phase line extending south from I-94 was built in 2010.

[¶16] The PSC determined both suppliers would need to construct upgrades and extensions to their existing systems to service to the Menard Site. Montana-Dakota proposed to: add neutral wire to convert approximately 5,700 feet of existing three-phase overhead line currently serving McKenzie from Delta to Wye configuration; convert approximately 1,200 feet of single-phase line to three-phase Wye and; extend that converted line underground for approximately 1,800 feet to the Menard Site. Montana-Dakota provided results of a study predicting the voltage drop between the McKenzie substation and the Menard Site would be less than 2.0 percent.

[¶17] The estimated cost for Montana-Dakota to upgrade the system and extend service to the Menard Site is \$192,671. Montana-Dakota's annual revenue requirement associated with the investment for the proposed extension is \$27,872. The PSC found that under Montana-Dakota's current rates the price to Menard for electrical service would be \$513,669.84. The PSC also found that Montana-Dakota would provide a net contribution of \$296,658 to common systems which would provide a benefit to other customers. Moreover, the PSC found that Montana-Dakota had only five system outages since January 2000.

[¶18] Capital Electric would need to convert approximately one-mile of single-phase line to three-phase line between its existing three-phase line and the Menard Site. The estimated cost for Capital Electric to extend service to the Menard Site is \$110,223. The PSC found that under Capital Electric's current rates the annual costs to Menard for electrical service would be \$575,883.84. Capital Electric did not provide any information or analysis of the amount of revenue Capital Electric would require for an adequate return on investment to serve the Menard Site. Capital Electric provided results of a study showing a voltage drop between the Menoken substation and the Menard Site of approximately 2.5 percent. Capital Electric states it could improve reliability of its three-phase line with an upgrade to a substation located in Sterling that,

currently, does not have the capacity to serve the entire load planned for the Menard Site. The costs of such an upgrade were not included with Capital Electric's proposed costs. The PSC found that Capital Electric experienced four outages on the system since 2009.

[¶19] After examining the ten factors, the PSC found that public convenience and necessity reasonably requires approval of Montana-Dakota's application because: the customer prefers service from Montana-Dakota; Montana-Dakota has operated in the area since 1928 and has more customers within one and two miles of the Menard Site; Montana Dakota provides less voltage drop and more reliability of service; Montana-Dakota's proposed extension is shorter; Montana-Dakota will serve the Menard Site more economically; and Montana-Dakota extension of service would best serve the community of McKenzie and realize significant cost savings to Menard, therefore best serving orderly and economic development of the area.

LAW AND DECISION

[¶20] Capital Electric makes several arguments on appeal. First, Capital Electric contends that Montana-Dakota does not have a franchise to serve the community of McKenzie. Second, that the PSC's determination that McKenzie is immediately northwest and adjacent to the Menard Site is not supported by the evidence. Next, the PSC misapplied the law in determining Montana-Dakota's extension of electrical services would best serve the orderly and economic development of the general area. Fourth, the PSC's finding that Montana-Dakota's proposed extension was shorter does not support the conclusions of law. Fifth, the PSC misapplied the law by making customer preference a key factor in the determination. Sixth, the PSC made additional errors of law and made findings that are not supported by the evidence. Finally, Capital Electric argues the PSC's decision contradicts the two primary purposes of the TIA.

[¶21] Under Chapter 49-03 of the North Dakota Century Code (TIA), “no public utility [can] extend its service lines outside the limits of a municipality which it was serving without a determination by the PSC that public convenience and necessity required such extension.” *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 417 (N.D. 1969). The administrative power to determine public convenience and necessity has been vested by law in the PSC. *Id.* at 419.

[¶22] The factors to be taken into consideration in determining whether an application should be granted are: location of the lines of the suppliers; the reliability of the service which will be rendered by them, which of the supplies will be able to serve the area more economically and still earn an adequate return on investment; which supplier is best qualified to furnish electric service to the site designated; which supplier can best develop electric service in the area without wasteful duplication of investment or service. *Application of Montana-Dakota Utilities Co.*, 219 N.W.2d 174, 180 (N.D. 1974). When there is substantial evidence to support the decision of the agency, the decision must be affirmed. *Otter Tail*, 169 N.W.2d at 419.

A. Montana-Dakota has a franchise to serve McKenzie

[¶23] Capital Electric argues that McKenzie’s township board is incapable of granting Montana-Dakota a franchise. A franchise is defined as a “government conferred right or privilege to engage in a specific business.” Black’s Law Dictionary (10th Ed. 2014). More specifically, “a franchise is a contract.” *Capital Electric Co-op., Inc. v. City of Bismarck*, 2007 ND 128, ¶ 15, 736 N.W.2d 788.

[¶24] North Dakota Century Code § 58-03-01 states, “[e]ach township is a body corporate and has capacity: . . . [t]o make such contracts . . . as may be necessary for the exercise of its corporate or administrative powers.” N.D.C.C. § 58-03-01(3). Under N.D.C.C. § 58-06-01, the

board of township supervisors has the power “[t]o grant any person the right of way for the erection of telephone lines, electric light systems, water or wastewater systems, or gas or oil pipeline systems over, under, or upon public grounds, streets, alleys, or highways.” N.D.C.C. § 58-06-01(10). Therefore, a township through its board of supervisors is capable of granting a franchise.

B. The PSC’s Determination that McKenzie is immediately Northwest and Adjacent to the Menard Site is supported by the evidence

[¶25] Capital Electric argues that the PSC’s determination that McKenzie is immediately northwest and adjacent to the Menard Site is not supported by the evidence. Capital Electric contends that 1,800 feet separate the Menard Site and the community of McKenzie and that the only property directly adjacent to and immediately northwest of the Menard Site is farmland. Moreover, Capital Electric claims that platting the area does not make it part of McKenzie. Capital Electric contends that the PSC’s faulty finding on this issue caused error in all the other issues before the PSC.

[¶26] However, Capital Electric has overlooked one important factor. The franchise granted by McKenzie’s board defines McKenzie’s borders as the Southeast ¼ of Section 29 and the Southwest ¼ of Section 28, Township 139N, Range 77W. Moreover, it is undisputed that the Menard Site is located at Northeast ¼ of Section 33, Township 139N, Range 77W. Evidence presented to the PSC established that the Southwest ¼ of Section 28 is adjacent to the Northeast ¼ of Section 33.

[¶27] Capital Electric argues that because the area is undeveloped, it is not part of McKenzie. However, that does not negate the fact that Montana-Dakota has a valid franchise for the area immediately adjacent to the Menard Site and has since 1928. Because there is substantial

evidence to support the PSC's decision that McKenzie is immediately Northwest and adjacent to the Menard Site it must be affirmed. *See, Otter Tail*, 169 N.W.2d at 419.

C. The PSC did not misapply the law by determining Montana-Dakota would best serve the orderly and economic development of the area

[¶28] The PSC found that Montana-Dakota's 86 year history of serving the McKenzie area, the greater number of customers within both one and two miles of the Menard Site, the immediate adjacency of McKenzie to the Menard Site, a \$62,214 difference between costs to provide service, and the lower costs to the manufacturing and distribution center all favored Montana-Dakota. The PSC also found that the upgrades proposed by Montana-Dakota to serve the Menard Site would create significant ancillary benefits to the McKenzie area and any potential growth.

[¶29] Capital Electric contends that the PSC's use of customer rates to make a determination on a supplier's costs undermines the primary purposes of the TIA. Instead, arguing that because its upgrade costs are \$82,000 less than Montana-Dakota's, this factor weighs in favor of Capital Electric. However, Capital Electric overlooks several issues with its position. First, Capital Electric failed to provide a complete costs analysis to the PSC. At the hearing, Capital Electric indicated that in order to improve the reliability of service to the Menard Site, Central Power Cooperative would need to upgrade the Sterling substation.

[¶30] However, those upgrade costs were not included in the proposal. Capital Electric also failed to indicate what revenue it would require to receive and adequate return on its investment. Perhaps most importantly, Capital Electric's upgrades would provide a much lower ancillary benefit to the general area. Currently, Capital Electric serves only four customers within one mile and eleven customers within two miles of the Menard Site. Moreover, there was no indication from the record that these customers would be benefited in any way.

[¶31] Capital Electric also argues that the PSC's focus on the community of McKenzie was a misapplication of the law and the sole focus should have been on the Menard Site. However, this argument is contrary to the issue that must be addressed by the PSC which concerns the general area. There can be no debate that a community located immediately adjacent to the Menard Site is within the general area. The evidence presented to the PSC established that Montana-Dakota would be able to provide service the Menard Site at a lower cost and the resulting upgrades would also benefit McKenzie and, in light of the other factors, would better serve the orderly and economic growth of the general area. On the contrary, Capital Electric failed to provide the PSC with a complete cost analysis of the upgrades required to provide reliable service to the area and failed to establish how other customers in the general area would benefit as a result of its service to the Menard Site.

[¶32] Additionally, it is not a misapplication of the law for the PSC to consider the effects that lower consumer costs will have when determining which electric supplier will better serve the orderly and economic growth of the general area. This PSC has used this factor in previous determinations. *See*, PU-08-345; PU-08-346; PU-08-347; PU-08-693. Based on the evidence presented to the PSC, a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.

D. The PSC's Finding that Montana-Dakota's proposed extension is shorter supports its Conclusions of Law

[¶33] Capital Electric claims that because its single phase line surrounds the Menard Site and Montana-Dakota's three phase line is "completely and utterly useless as-is" the PSC erred in concluding that convenience and necessity reasonably required approval of Montana-Dakota's application. Capital Electric argues that Montana-Dakota's three phase line located 1,800 feet away is no better than Capital Electric's single phase line surrounding the site because both lines

need upgrades. In sum, Capital Electric contends that because it only needs to update 5,280 feet for a total cost of \$44,527.31 and Montana-Dakota would be required to make upgrades and extensions over 8,700 feet for a total cost of \$126,632.00 that its extension is shorter.

[¶34] However, Capital Electric concedes that Montana-Dakota's current three phase system is closer to the Menard Site. *See, Appellant Capital Electric Cooperative, Inc.'s Brief* (Capital Electric Brief), ¶ 68, 1/23/15; (Doc. Id #68). Based on the evidence presented to the PSC, Montana-Dakota would need to update its existing three phase line and extend it for 1,800 feet. On the contrary, Capital Electric would have to convert roughly a mile of single-phase line in order to service the site.

[¶35] This Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency." *Vanlighthout*, 2011 ND at ¶ 12, 799 N.W.2d 397. This Court "determine[s] only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record. *Id.* Moreover, when there is substantial evidence to support the decision of the agency, the decision must be affirmed. *Otter Tail*, 169 N.W.2d at 419.

[¶36] In the present case, the PSC found that "[t]he proposed extension of Montana-Dakota's three-phase system to serve the [Menard] site is shorter than the proposed extension of Capital Electric's three-phase system. It is clear from this finding that the PSC was not concluding that the total length of proposed additions and upgrades was shorter, but solely that an extension of Montana-Dakota's currently existing three phase system would be shorter than an extension of Capital Electric's three phase system. Capital Electric concedes this as true. Moreover, the PSC indicates in its decision that both parties would be required to upgrade their existing systems. *Findings of Fact, Conclusions of Law and Order* (Order), ¶ 27, Sept. 17, 2014; (Doc. Id# 56). As

discussed above, the PSC also determined that Montana-Dakota's extension and upgrades would better serve the area and its numerous customers currently located there would also benefit. As a result, a reasoning mind could reasonably conclude that the factual conclusions were proved by the weight of the evidence.

E. The PSC did not make customer preference a key factor in its determination

[¶37] Capital Electric argues that because the PSC made six bullet point findings and three of those findings rely on Menard's preference for service from Montana-Dakota or on cost savings that would be received by Menard the PSC relied too heavily on customer preference. Capital Electric contends that the PSC's decision will result in rate-shopping by potential customers.

[¶38] Customer preference, while a factor to be considered, is not controlling. *Cass County Elec. Coop v. World Properties, Inc.*, 249 N.W.2d 514, 521 (N.D. 1976). North Dakota Supreme Court decisions indicate that "in rural areas . . . customer preference is a minor consideration." *Tri-County Elec. Co-op, Inc. v. Elkin*, 224 N.W.2d 785, 792 (N.D. 1974). "It cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice." *Id.* "[C]ustomer preference does not govern the [PSC] in its decision but subjects the customer's preference for a regulated public utility service to an inquiry and decision by the [PSC] on the question of public convenience and necessity. *Id.*

[¶39] Here, the PSC found customer preference favored Montana-Dakota. However, Capital Electric argues the PSC erred when it considered the cost-savings Menard would recognize by receiving service from Montana-Dakota in its conclusions on other factors. Specifically, that Montana-Dakota would serve the location more economically and still receive an adequate return on investment and that Montana-Dakota would best serve the orderly and economic development of the general area by best serving McKenzie and providing significant cost savings to Menard.

[¶40] In the present case, the PSC did not give too much weight to customer preference. Instead, it determined that Montana-Dakota was Menard's preferred choice. It then examined each of the remaining factors and concluded that on balance those factors favored Montana-Dakota. Capital Electric now takes issue with the PSC's consideration of the cost savings that would be realized while examining these other factors.

[¶41] However, Capital Electric failed to provide the PSC with the amounts it would need to receive an adequate return on its investment and based on the information presented the PSC determined that Montana-Dakota would be able to provide a lower cost to the Menard site, even after a larger upfront investment. With respect to more economical service and an adequate return on investment, the PSC seemed to be more concerned with the benefits that would be received by not only Menard, but Montana-Dakota's other customers.

[¶42] Moreover, with respect to the orderly and economic development of the general area, the PSC indicated that a primary consideration of that factor is whether a suppliers cost to provide service exceeds the cost of another supplier to provide service to the same customer. *See, Order* at ¶ 25; (Doc. Id# 56). Additionally, the PSC's decision was not based solely on the cost savings, the PSC also considered that Montana-Dakota has held a valid franchise and CPCN since 1928, that the upgrades required to serve the Menard Site would also upgrade the system serving McKenzie, and that Menard would realize a significant cost savings. In technical matters involving agency expertise; the Commission's decision is entitled to appreciable deference. *See, Coteau*, 2000 ND at ¶ 5, 606 N.W.2d 876.

[¶43] Interestingly, it appears that customer preference "cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice." *See, Tri-County*, 224 N.W.2d at 792. This suggests that customer preference cannot be used as a

factor to outweigh other factors. However, in the present case, the PSC determined that six of the ten factors reviewed, including economic factors, favored Montana-Dakota. The PSC did not base its additional findings, where it considered cost savings, solely on the cost savings to Menard. Based on these findings, the PSC did not give too much weight to customer preference.

F. The PSC's decision did not misapply the law and is supported by the weight of the evidence

[¶44] Capital Electric argues the PSC erred when it concluded that Montana-Dakota can serve the Menard Site more economically and still earn an adequate return on investment because its costs to extend service are 65% less than Montana-Dakota's. Capital Electric also claims the PSC erred when it concluded that either extension would not interfere with the other supplier's system or service because it will result in the area being checker boarded by Montana-Dakota and Capital Electric.

[¶45] Capital Electric asks this Court to conclude that the only consideration for this factor can be the cost to extend service. However, the PSC considered the benefits that would be received by other customers and consideration of "not only the revenue requirement associated with incremental investment to extend service, but also the other costs of electric distribution, transmission and generation as reflected in the service provider's rates. *See, Order* at ¶¶ 20-22; (Doc. Id# 56). The PSC also considered the net contribution that would be received and provide a benefit to Montana-Dakota's other customers. As discussed above, Capital Electric failed to provide the PSC with the amounts it would need to receive an adequate return on its investment. In technical matters involving agency expertise; the Commission's decision is entitled to appreciable deference. *See, Coteau*, 2000 ND at ¶ 5, 606 N.W.2d 876. As a result, the PSC's finding on this factor did not misapply the law and is supported by the weight of the evidence.

[¶46] Next, the PSC found that both Capital Electric and Montana-Dakota currently cross or would cross each other's lines in the area. The PSC found that Montana-Dakota's proposed line would cross Capital Electric's single-phase line west of the Menard Site, which is not capable of and is not proposed for use to serve the Menard Site. The PSC also found that Capital Electric's three-phase line that feeds its single-phase line already crosses Montana-Dakota's three phase line serving McKenzie. Capital Electric contends that allowing Montana-Dakota to cross Capital Electric lines that surround the Menard Site results in the territory being checker boarded and economically interferes with Capital Electric's system because it spent money extending its system.

[¶47] However, neither Capital Electric nor Montana-Dakota provided any evidence that the extension of service would unreasonably interfere with the service or system of the other. As a result, the PSC found:

Montana-Dakota and its predecessors have been serving the community of McKenzie, directly adjacent to the Menard Site, since 1928 in close proximity to Capital Electric's system. . . . The [TIA] does not provide that rural electric cooperatives are the preferred supplier of electric service in all rural areas of the state but rather requires a public utility to obtain a [CPCN] before it extends facilities in a rural area.

Order, at ¶ 33; (Doc. Id# 56). Based on the lack of evidence presented to the PSC, "a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record. *Vanlighthout*, 2011 ND at ¶ 12, 799 N.W.2d 397.

G. The PSC's decision does not contradict the purposes of the TIA.

[¶48] Capital Electric contends that the PSC's determination endorses wasteful duplication and encourages future conflict. The primary purpose of the TIA is to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity.

Cass Co. Elec. Co-op v. Northern States Power Co., 419 N.W.2d 181, 184-85 (N.D. 1988).

[¶49] Capital Electric argues that the PSC's decision sanctions Montana-Dakota's duplication of their already existing electric facilities, which, Capital Electric claims are capable of handling the load required for the Menard Site. However, the North Dakota Supreme Court has held that while the purposes of the TIA is to minimize wasteful duplication and conflicts between service providers:

[T]he Act's implementing statutes do not necessarily guarantee the accomplishment of that purpose. Under our statutory scheme, electric public utilities must, with few exceptions, secure a [CPCN] from the PSC in order to extend their electric distribution facilities. On the other hand, electric cooperatives are largely unregulated in the sense that they have the ability to expand their electrical services without having to first obtain a [CPCN]. Thus, in light of the current regulatory situation, it may not always be possible to prevent some of the actual duplication of distribution facilities which may occur in practice when cooperatives extend their existing electrical systems.

Northern States Power Co. v. North Dakota Public Service Com'n, 452 N.W.2d 340, 344 (N.D. 1990)(internal citations omitted). Moreover, the North Dakota Supreme Court has held that which electric supplier's facilities are actually duplicative or wasteful is one of fact for the PSC to determine. *Id.* at 345.

[¶50] Here, the PSC determined that no wasteful duplication would occur from approval of the application. The PSC considered whether the lines would be crossed and the impact on the electric service within McKenzie. It concluded that both providers' lines would cross, or in Capital Electric's case had already crossed, the other's lines. Additionally, the PSC concluded Montana-Dakota's upgrades would provide a benefit to the community of McKenzie in addition to serving the Menard Site and any potential growth.

[¶51] Capital Electric argues the PSC should have examined whether the extension required one supplier to cross the other's lines and not whether crossing had occurred in the past. Additionally, Capital Electric contends the PSC should have addressed whether one provider's

costs to extend exceeded the other's cost in determining whether the application would result in wasteful duplication.

[¶52] Here, the PSC determined that based on the crossing of lines and the benefit to McKenzie, wasteful duplication would not occur. Additionally, the PSC did determine the costs required to extend service. The PSC found that Capital Electric's costs to extend service were approximately \$82,000 less than Montana-Dakota. *See, Order*, at ¶¶ 18-19; (Doc. Id# 56). However, the PSC determined that the upgrades provided by Montana-Dakota would improve electric service within McKenzie and would help meet any potential growth.

[¶53] It is not this Court's function to act as a super board when reviewing decisions by an administrative agency and in technical matters involving agency expertise; the Commission's decision is entitled to appreciable deference. *Coteau*, 2000 ND at ¶ 5, 606 N.W.2d 876. Here, the PSC's determination of wasteful duplication is entitled to appreciable deference. As a result, the PSC's determination will not be reversed.

[¶54] Additionally, the primary purpose of the TIA is to *keep to a minimum* wasteful duplication of capital-intensive utility services. *Cass Co. Elec. Co-op v. Northern States Power Co.*, 419 N.W.2d 181, 184-85 (N.D. 1988)(emphasis added). The TIA is not intended to prevent all wasteful duplication, only to minimize it. Therefore, even assuming that the PSC erred in its wasteful duplication determination, the primary purpose of the TIA, to minimize wasteful duplication, is still served by granting the application.

[¶55] The North Dakota Supreme Court has indicated that while preventing wasteful duplication is a goal of the TIA it may not always be possible to prevent some of the actual duplication of distribution facilities. *See, Northern States Power Co. v. North Dakota Public Service Com'n*, 452 N.W.2d 340, 344 (N.D. 1990). Even assuming the PSC erred and this factor

should have favored Capital Electric, five of the ten factors would still weigh in favor of Montana-Dakota, one factor, wasteful duplication, would favor Capital Electric, and four would favor neither party. Based on these factors, the PSC would have still determined that public convenience and necessity favored the granting of a CPCN to Montana Dakota. This is especially true considering that it is not required to prevent wasteful duplication in all instances. *See, Cass Co. Elec. Co-op v. Northern States Power Co.*, 419 N.W.2d 181, 184-85 (N.D. 1988). As a result, the PSC's determination has fulfilled the primary purpose of the TIA to minimize wasteful duplication.

[¶56] Finally, Capital Electric argues that the PSC's decision encourages future conflict. Capital Electric argues that this determination sets a precedent that allows public utilities to seek large loads in rural areas and encourages future conflicts. The Court finds this argument is unavailing. The TIA sets out the requirements for a public utility to extend its service lines outside a municipality. *See, N.D.C.C. Ch. 49-03*. In order to do so a public utility must apply for and receive a CPCN, which can only be done after the PSC makes a finding of public convenience and necessity. This process has been in place since the TIA was adopted and the PSC's ruling in this case cannot change those requirements. As a result, the PSC's decision adequately minimizes wasteful duplication, will not encourage future conflict, and is not contrary to the primary purposes of the TIA.

CONCLUSION

[¶57] This Court concludes that Capital Electric has failed to show that the PSC's determination is not in accordance with the law, that the findings of fact made by the PSC are not supported by the evidence, or that its conclusions and decision are not supported by its findings of fact. *Cass County Elec. Coop. v. Otter Tail Power Co.*, 169 N.W.2d 415, 419 (N.D. 1969). While it does appear that the PSC was concerned with the benefits provided to the general area when it approved the application such concerns do not warrant reversal.

[¶58] The decision of the PSC is in all respects **AFFIRMED**.

[¶59] IT IS SO ORDERED

Dated this 3rd day of June, 2015.

BY THE COURT:



James S. Hill, District Judge
South Central Judicial District

cc: